



6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 35**

**[EPA-HQ-OW-2016-0568; FRL 9953-23-OW]**

**RIN 2040-AF64**

### **Fees for Water Infrastructure Project Applications under WIFIA**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to establish fees related to the provision of federal credit assistance under Subtitle C of the Water Resources Reform and Development Act of 2014 (WRRDA), which is referred to as the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA). WIFIA authorizes EPA to provide secured (direct) loans and loan guarantees to eligible water infrastructure projects and to charge fees to recover all or a portion of the Agency's cost of providing credit assistance and the costs of retaining expert firms, including financial, engineering, and legal advisory services, in the field of municipal and project finance to assist in the underwriting and servicing of Federal credit instruments. The agency seeks comment on all aspects of this proposal.

**DATES:** Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OW-2016-0568, at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you

consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

**FOR FURTHER INFORMATION CONTACT:** Jordan Dorfman, Water Infrastructure Division, Office of Wastewater Management, Mail Code 4201C, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC, 20460; telephone number: (202)564-0614; email address: [dorfman.jordan@epa.gov](mailto:dorfman.jordan@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. General Information**

#### *A. Does this Action Apply to Me?*

This action only applies to entities seeking credit assistance under the WIFIA program for the development and construction of a water infrastructure project. EPA has published an interim final rule to implement this new credit assistance program in the “Rules and Regulations” section of this **Federal Register**. A list of eligible entities and eligible projects can be found in the Interim Final Rule entitled, “Credit Assistance for Water Infrastructure Projects.” This interim final rule is available at Docket ID No. EPA-HQ-OW-2016-0569, at <http://www.regulations.gov>.

#### *B. What Should I Consider as I Prepare My Comments for EPA?*

*Submitting Confidential Business Information (CBI).* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk, CD-ROM, or flash drive that you mail to EPA, mark the outside of the disk, CD-ROM, or flash drive as CBI and then identify electronically within the disk, CD-ROM, or flash drive the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

*Tips for preparing your comments.* When submitting comments, remember to:

- Identify the document by docket ID number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions. The Agency may ask you to respond to specific questions.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

## **II. Background**

### *A. What Action is the Agency Taking?*

EPA is proposing to establish fees associated with the provision of federal credit assistance under the WIFIA program. WIFIA authorizes EPA to provide secured (direct) loans and loan guarantees to eligible water infrastructure projects. EPA has published an Interim Final Rule entitled, “Credit Assistance for Water Infrastructure Projects” to establish procedures for the implementation of the WIFIA Program. As specified under 33 U.S.C. 3908(b)(7), 3909(b), and 3909(c)(3), Congress in WIFIA authorizes EPA to charge fees to recover all or a portion of the Agency’s cost of providing credit assistance and the costs of retaining expert firms, including financial, engineering, and legal advisory services, in the field of municipal and project finance to assist in the underwriting and servicing of Federal credit instruments. EPA is proposing an application fee, credit processing fee, servicing fee, and fee for extraordinary expenses to cover these costs to the extent not covered by congressional appropriations.

### *B. What is the Agency's Authority for Taking this Action?*

This proposed rule is issued under the authority of 33 U.S.C. 3908(b)(7), 3909(b), 3909(c)(3), and 3911.

### *C. What Fees are Being Proposed?*

In the Interim Final Rule entitled, “Credit Assistance for Water Infrastructure Projects,” EPA established an application process for WIFIA credit assistance that is divided into two steps. The first step requires the submission of a letter of interest. No fees are proposed for the letter of interest step. Projects selected to continue in the application process will then be invited to submit an application at which time the application fee must be paid. For this second step, EPA will only select those projects that it expects might reasonably proceed to closing. For more

information on this process, please refer to the WIFIA Implementation Rule at 40 CFR part 35 subpart Q or in Docket ID No. EPA-HQ-OW-2016-0569, at <http://www.regulations.gov>.

Consequently, EPA anticipates that the fees proposed in this notice would apply only to projects the Agency expects are likely to proceed to closing. Detailed application information will be contained in a program guide developed by EPA and will be posted on the WIFIA website and made available to the public at the time a solicitation for letters of interest is published. This two-step process limits the time, cost and effort required to be expended by prospective borrowers prior to having a reasonable expectation of funding by WIFIA.

While this rule, and the interim final WIFIA Implementation Rule, have separate processes for comments, EPA is aware that the similar timelines for comment and the relationship between the two rules may cause confusion. Therefore, in the event that comments are received for this rule under the heading of the interim final rule, or vice versa, EPA will consider all comments and respond accordingly.

As described in greater detail below, the types of fees EPA is proposing to establish are consistent with other Federal Credit programs. In particular, the WIFIA program was designed by Congress to resemble the Transportation Infrastructure Finance and Innovation Act program, commonly known as TIFIA. Accordingly, to the extent practicable, the WIFIA program has been crafted by EPA to be implemented in a similar manner as the Department of Transportation implements the TIFIA program. The rationale for establishing these fees is to cover EPA's costs of administering the program to the extent these costs are not covered by congressional appropriations. To effectively administer the program, EPA will incur both internal administrative costs (staffing, program support contracts, and other costs) as well as the costs of retaining expert firms, including legal, engineering, and financial advisory services, in the field

of municipal and project finance, to assist in the underwriting of the Federal credit instrument. As explained in greater detail below, the latter costs may range from \$350,000 - \$700,000 per project, though EPA cannot provide assurance that costs will not exceed this range. Assuming 10 loans at an average of \$100 million per loan, external expert costs alone could be in the range of \$3.5 million to \$7 million, and those costs could be higher if a larger number of loans (with a smaller average loan size) were made. The combination of EPA's internal administrative costs and these external expert costs would not be fully covered by the \$2.2 million set aside for administrative costs in WIFIA. To the extent Congress does not appropriate funds to cover these program costs, EPA will need to exercise its authority under WIFIA to recover such costs through fees in order to effectively administer the program.

In many lending contexts, such fees can be reimbursed as part of the principal of the loan. WIFIA, however, prohibits this by not including such fees as eligible project costs. However, other sources of financing can finance the fees. WIFIA assistance can only pay for up to 49% of eligible project costs. The remaining costs must be borne by the borrower, either internally or through another financing source. While fees cannot be used to calculate the amount eligible for WIFIA financing, the fees can still be reimbursed from other sources. While the ability to finance fees with a WIFIA loan could reduce the burden on applicants by allowing the reimbursement for these costs by the loan proceeds, EPA's reading of the statute is that this would require amendment to the WIFIA statute or specific authorizing language in an appropriations bill.

#### *Application Fee*

EPA is proposing to require a non-refundable fee for each project that is invited to submit a full application (second step following submission of letter of interest) for credit assistance

under WIFIA. EPA is proposing that an application fee will be due upon submission of the application. For fiscal year 2017, EPA is proposing an application fee of \$25,000 for applications for projects serving small communities (population of not more than 25,000 people). For all other project applications, EPA is proposing an application fee of \$100,000. As proposed, these application fees represent an amount equal to 0.5 percent of the minimum threshold project cost (\$5 million for small communities and \$20 million for larger communities, 33 U.S.C. 3907(a)(2)), which EPA considers to be sufficient for the Agency to begin the financial and legal analysis of the project while providing assurance that the applicant intends to proceed to closing, and therefore costs incurred by the Agency may be recovered. EPA will undertake significant costs to evaluate applications and hire expert firms for underwriting and considers an application fee essential for applicants to show good faith in applying for assistance, to help cover the agency's administrative costs in processing applications, and to ensure effective administration of the program. EPA proposes that these fees be required at the time of submission of the full application and that the full application will not be reviewed without fee payment. Because EPA will only invite projects to submit an application and application fee if the project is expected to proceed to closing, no applicant would pay a fee without a reasonable expectation that the project could receive funding.

For fiscal years 2018 and beyond, the Agency may need to adjust the amount of the application fee based on early program implementation experience. A change in the application fee will not change the total fees charged, only the initial fee which is credited to the final fee at closing, or in the event that the project does not proceed to closing, withdrawal of the application, or denial. EPA seeks comment on proposed regulatory language that would authorize the Agency to change the default application fee in subsequent years through the

NOFA. In addition, EPA seeks comment on whether changes to the application fee should be made through notice and comment or, alternatively, whether the agency should establish any criteria or constraints for adjustment of this fee through NOFAs and, if so, what those should be.

#### *Credit Processing Fee*

EPA is also proposing to require a credit processing fee at the time of closing, or in the event that the project does not proceed to closing, e.g., if the application is withdrawn or denied, for projects selected to receive assistance in the form of a direct cash payment. The proceeds of any such fees would be used to pay the remaining portion of the Agency's cost of providing credit assistance and the costs of retaining expert firms, including legal, engineering, and financial advisory services, in the field of municipal and project finance to assist in the underwriting of the Federal credit instrument. EPA proposes that the initial application fee described above would be credited to the credit processing fee. For example, if the total credit processing fee is \$400,000 and the applicant paid \$100,000 with the application, \$300,000 would be due at closing, or in the event that the project does not proceed to closing, e.g., if the application is withdrawn or denied. The fee for each project would be set based on the costs incurred by EPA for that specific project. Due to the nature of credit processing, the amount is expected to vary among applicants. This variation is a reflection of the amount of time taken to process a loan, which may not directly correlate with the size of the loan. More complicated transactions with lengthy negotiations will have higher costs. EPA estimates these costs could be in the range of approximately \$350,000 - \$700,000 per project, broken down as follows:

- Financial advisor: \$100,000 to \$250,000 per project;
- Law firm: \$200,000 to \$350,000 per project; and
- Engineering firm: \$50,000 to \$100,000 per project.



EPA is proposing to authorize the waiver of a portion of the fee charged to an applicant in the event that Congress appropriates resources adequate to pay for EPA's cost of administering the WIFIA program as well as additional funding to pay for loan processing. WIFIA currently provides that EPA may retain \$2.2 million annually from funds appropriated to the program to pay for the administration of the program, including internal administrative costs of staffing, program support contracts (separate from the expert advisory services described previously), and other internal administrative needs. EPA requests comment on including a provision in the final rule allowing EPA to waive fees.

To the extent Congress appropriates administrative funds in excess of those needed for EPA's internal administrative costs, EPA is proposing to authorize the use of the remaining available administrative allowance (less any amount needed for future years' administration) to reduce fees. EPA is proposing three alternative methods by which the Agency could allocate additional administrative funds to reduce fees:

- By reducing fees by an equal amount per loan in the relevant year;
- By reducing fees by an equal amount per loan for those projects serving a population of not more than 25,000; or
- By reducing fees by an equal amount per loan for those projects that serve a population with a median household income that is 80 percent or less of the state median household income.

Alternatively, EPA could allocate such fee reductions through a combination of these three methods. EPA requests comment on each of these potential options or other potential approaches not discussed here. In the final rule, the Agency would expect to include regulatory

text addressing criteria for allocating fee reductions.

#### *Servicing Fee*

EPA is also proposing to charge an annual servicing fee during repayment of the loan. The fee will be dependent on the costs of servicing the credit instrument as determined by the Administrator. EPA proposes that such fees would be set at a level to enable the Agency to recover all or a portion of the costs to the Federal Government of servicing WIFIA credit instruments and will be determined at the time of closing. EPA expects such fees to range from \$12,000 to \$15,000 annually per loan.

#### *Extraordinary Expenses*

EPA is also proposing a fee to cover extraordinary expenses. In the event that a borrower experiences difficulty relating to technical, financial, or legal matters or other events (e.g., engineering failure or financial workouts) which require EPA to incur time or expenses beyond standard monitoring, EPA will be entitled to payment in full from the borrower of additional fees in an amount determined by EPA and of related fees and expenses of its independent consultants and outside counsel, to the extent that such fees and expenses are incurred directly by EPA and to the extent such third parties are not paid directly by the borrower.

#### *Optional Supplemental Fee*

EPA is also proposing to allow a separate fee to be charged, with agreement of the applicant, to reduce the budget authority required to fund the credit instrument. Although EPA considers it unlikely that a scenario will arise under which it would assess such a fee, the Agency sees benefit in establishing the flexibility to allow an applicant to “buy down” the budget authority required for the credit instrument. This could allow an applicant to proceed to closing in the event that sufficient budget authority would not otherwise be available. EPA proposes that

any such fee would only be charged upon agreement by an applicant.

#### *Request for Comment*

EPA requests comment on each of the proposed fees described above, including whether to establish such fees, proposed fee levels or approaches for calculating fees, and potential criteria and methodologies for waiving all or a portion of such fees in the event that Congress appropriates sufficient funds to permit such a waiver. In particular, EPA requests comments on prospective borrowers' ability to pay these fees, the use of an upfront application fee, and options for applicants to finance fees. EPA also requests comment on the proposed reduced application fee for small communities and the extent to which this fee reduction is adequate to ensure small communities can effectively access the WIFIA program. EPA understands that payment of fees may be difficult for some applicants and requests comment on potential approaches that could address such concerns while allowing EPA to recover its costs to ensure effective and sustainable administration of the WIFIA program.

### **III. Statutory and Executive Orders Reviews**

#### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. This rule has been determined significant because it affects the rights and obligations of recipients of a loan program and raises novel legal or policy issues arising out of a legal mandate. Any changes made in response to OMB recommendations have been documented in the docket.

#### *B. Paperwork Reduction Act*

This action does not impose an information collection burden under the PRA because this

proposal would merely establish fees associated with a previously promulgated rule.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the Federal Register and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

### *C. Regulatory Flexibility Act*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. Participation in the WIFIA loan program is voluntary. While many projects serving small communities are potentially eligible for WIFIA loans, we anticipate only one to two small community applications per year as small communities have access to below market rate loans and other subsidies through the Clean Water State Revolving Fund, the Drinking Water State Revolving Fund, and other funding sources. A small community will only apply and undertake a WIFIA loan in cases where the WIFIA loan provides positive economic benefits relative to other potential funding sources, based upon consideration of relevant economic factors, including loan rate, loan terms, fees and other transaction costs. We have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175. While a tribal government, or a consortium of tribal governments may apply for WIFIA credit assistance, this action does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because environmental health or safety risks are not addressed by this action.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This action is not a “significant energy action” because it is not likely to have a

significant adverse effect on the supply, distribution or use of energy. This rulemaking simply imposes fees required to apply for credit assistance; therefore, by itself, this rulemaking will not have any effect on the supply, distribution or use of energy.

*I. National Technology Transfer and Advancement Act (NTTAA)*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

This action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard.

*K. National Environmental Policy Act*

Each project obtaining assistance under this program is required to adhere to the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.). This rulemaking simply imposes fees required to apply for credit assistance; therefore, by itself, this rulemaking will not have any effect on the quality of the environment.

**List of Subjects in 40 CFR Part 35**

Environmental protection, Reporting and recordkeeping requirements, and Water finance.

Dated: December 6, 2016.

Gina McCarthy,  
Administrator.

For the reasons set forth in the preamble, EPA proposes to amend 40 CFR part 35 as follows:

## **PART 35--STATE AND LOCAL ASSISTANCE**

1. The authority citation for part 35 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 300f *et seq.*; 42 U.S.C. 6901 *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 42 U.S.C. 13101 *et seq.*; Pub. L. 104-134, 110 Stat. 1321, 1321-299 (1996); Pub. L. 105-65, 111 Stat. 1344, 1373 (1997), 2 CFR 200.

2. Add §35.10080 to read as follows:

### **§35.10080 Fees.**

- (a) *Application fee.* EPA will require a non-refundable application fee for each project applying for credit assistance under the WIFIA program. An application fee will be due upon submission of the complete application. For applications for projects serving small communities (population of not more than 25,000 people), this application fee will be \$25,000. For all other applications, this application fee will be \$100,000. The initial application fee will be credited to the credit processing fee required under subsection (c).
- (b) *Adjustment of application fee.* For each application and approval cycle, EPA may adjust the amount of the application fee described in subsection (a) based on program implementation experience and cost expectations. EPA will publish this amount in each Federal Register solicitation for letters of interest.
- (c) *Credit processing fee.* Except as otherwise provided in subsection (f), EPA will require an additional credit processing fee for projects selected to receive WIFIA assistance upon closing, or in the event that the project does not proceed to closing, e.g., if the application is withdrawn or denied. The proceeds of any such fees will be used to pay the remaining portion of the Agency's cost of providing credit assistance and the costs of retaining expert

firms, including financial, engineering, and legal advisory services, in the field of municipal and project finance, to assist in the underwriting of the Federal credit instrument. All of, or a portion of, this fee may be waived.

- (d) *Servicing fee.* EPA will require borrowers to pay a servicing fee for each credit instrument approved for funding. Separate fees may apply for each type of credit instrument (e.g., a loan guarantee, a secured loan with a single disbursement, or a secured loan with multiple disbursements), depending on the costs of servicing the credit instrument as determined by the Administrator. Such fees will be set at a level sufficient to enable the EPA to recover all or a portion of the costs to the Federal Government of servicing WIFIA credit instruments.
- (e) *Optional supplemental fee.* If, in any given year, there is insufficient budget authority to fund the credit instrument for a qualified project that has been selected to receive assistance under WIFIA, EPA and the approved applicant may agree upon a supplemental fee to be paid by or on behalf of the approved applicant at the time of execution of the term sheet to reduce the subsidy cost of that project. No such fee may be included among eligible project costs.
- (f) *Reduced fees.* To the extent that Congress appropriates funds in any given year beyond those sufficient to cover internal administrative costs, EPA may utilize such appropriated funds to reduce fees that would otherwise be charged under subsection (c).
- (g) *Extraordinary expenses.* EPA may require payment in full by the borrower of additional fees, in an amount determined by EPA, and of related fees and expenses of its independent consultants and outside counsel, to the extent that such fees and expenses are incurred directly by EPA and to the extent such third parties are not paid directly by the borrower, in the event that a borrower experiences difficulty relating to technical, financial, or legal



matters or other events (e.g., engineering failure or financial workouts) which require EPA to incur time or expenses beyond standard monitoring.

[FR Doc. 2016-30192 Filed: 12/16/2016 8:45 am; Publication Date: 12/19/2016]